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HON. BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ACCESS TO ADVANCED HEALTH
INSTITUTE,

Plaintiff,

v.

PATRICK SOON-SHIONG, M.D. and CHAN
SOON-SHIONG FAMILY FOUNDATION,

Defendants.

Case No. 2:24-CV-01253

**CORRECTED Plaintiff's Supplemental
Memorandum in Support of Plaintiff's
Emergency Motion for Temporary
Restraining Order**

1 Plaintiff Access to Advanced Healthcare Institute (“AAHI”) respectfully submits this
 2 supplemental memorandum in support of its TRO Motion and requests the Court’s consideration
 3 of this further submission in light of subsequent events that have recently transpired and the
 4 supplemental submission by defendants from earlier today. As demonstrated in the supplemental
 5 declaration submitted by Dr. Soon-Shiong this morning, as well as the Second Supplemental
 6 Declaration of Ms. Decaire filed herewith, Dr. Soon-Shiong has continued with the flagrant
 7 breaches of fiduciary duty underlying this action.
 8

9 **I. New Developments Since the Filing of AAHI’s Reply Brief that Confirm the**
 10 **Need for Emergency Relief**

11 **a. The Invalid “Board Meeting” Held on August 25 and the Purported**
 12 **Appointment of the “Litigation Committee”**

13 On August 25, 2024—yesterday—Dr. Soon-Shiong convened a rump session of a subset
 14 of the AAHI board of directors to address the Grant Agreement dispute and related issues. Dr.
 15 Soon-Shiong and a partner from his personal outside law firm, Wilson Sonsini, led the meeting
 16 despite their conflict of interest. Dr. Cherrington and Dr. Kwong were excluded from the meeting
 17 despite their prior appointment to the board; former board member Dr. Kerr participated in and
 18 voted at the meeting despite his prior resignation; and Dr. Soon-Shiong proceeded with the meeting
 19 despite the pendency of the TRO motion and over objections from four directors (Dr. Casper, Dr.
 20 Mocarski, Dr. Cherrington, and Dr. Kwong).

21 As this meeting, Dr. Soon-Shiong and the attending directors (Mr. Hsu, Dr. Gray, and Dr.
 22 Concepcion) purported to make a series of decisions that, based on the proposed order submitted
 23 in conjunction with the TRO Motion, would be invalid. Those decisions include: (1) the purported
 24 termination of AAHI’s CEO, Dr. Casper, and its General Counsel and Chief Strategy Officer, Ms.
 25 Decaire, and naming of one of the directors aligned with Dr. Soon-Shiong, Dr. Concepcion, as an
 26 “interim CEO,” Supp. Soon-Shiong Decl. ¶ 6 & Exh. 1 at 7; (2) the formation of a “Litigation
 27

Committee” consisting of two directors aligned with Dr. Soon-Shiong, Dr. Concepcion and Mr. Hsu, *Id.* ¶ 7 & Exh 1 at 7; (3) the retention of an HR consultant to advise AAHI regarding “an internal plan for transitioning duties and communicating with employees and other key stakeholders,” *Id.* ¶ Exh. 1 at 7; (4) allowing Dr. Kerr to participate in the meeting and vote as a director despite his prior unqualified resignation from the board with “immediate effect,” *Id.* ¶ 5; (5) the purported appointment of three additional directors—including ***Dr. Soon-Shiong’s personal lawyer in South Africa, Robert Appelbaum***—without any prior notification to the full board, any nomination from the nominating committee as required by AAHI’s by-laws, or any prior consideration of their qualifications to serve on the board of a Seattle-based non-profit, *Id.* Exh. 1 at 7; (6) the approval of a “settlement” reached between Dr. Soon-Shiong’s Foundation (and executed by him on its behalf) and the “Litigation Committee,” under which Dr. Soon-Shiong’s Foundation would pay the remaining \$8 million owed under the Grant Agreement, but only on the condition that AAHI would in turn redistribute all that money (and then some) for “pandemic preparedness and rapid response, including a public benefit organization in South Africa” and by transferring \$9 million to Dr. Soon-Shiong’s preferred organizations in South Africa over three years (including \$3 million this year), *Id.* Exh. 1 at 7, Exh. 2; and (7) Dr. Soon-Shiong directing, “as a material term of the settlement,” that the purportedly independent Litigation Committee “direct Susman Godfrey to dismiss the litigation.” *Id.* ¶ 9.

These resolutions were hastily passed without any consideration of whether such transfers were in the best interest of AAHI, how they would financially impact AAHI or further its tax-exempt mission, or whether they provide a private benefit to board members in violation of AAHI articles and applicable Washington and federal tax laws. And although the minutes indicate that Dr. Soon-Shiong abstained from voting on the supposed settlement, the minutes indicate that he

1 participated in the entirety of the meeting and that the entire meeting was orchestrated by Dr. Soon-
 2 Shiong and his lawyers. *Id.* Exh. 1.

3 The meeting (1) spanned less than two hours, suggesting that the important organization
 4 business purportedly conducted (terminating executives, changing the organizational mission,
 5 settling litigation, etc.) was in fact pre-determined by Dr. Soon-Shiong and his advisors; (2) was
 6 conducted by less than a quorum of the full board and over objections of a majority of the
 7 unconflicted directors of the board; (3) and led by Dr. Soon-Shiong's outside advisors at Wilson
 8 Sonsini, who are in direct conflict with AAHI and have fiduciary duties only to Dr. Soon-Shiong.
 9 Indeed, the minutes do not contain any suggestion that the participants in this meeting devoted any
 10 consideration of what was in the best interests of AAHI—the organization to which, as directors,
 11 they owe fiduciary duties.
 12

13 **b. The August 25 Email from the So-Called “Litigation Committee”**

14 On the evening of August 25 Dr. Concepcion and Ed Hsu, on behalf of Dr. Soon-Shiong's
 15 so-called “Independent Litigation Committee, emailed the undersigned counsel. The email
 16 claimed that AAHI's counsel was no longer authorized to act on behalf of AAHI, that the Litigation
 17 Committee had retained Perkins Coie to represent the Litigation Committee, and requested that
 18 counsel “stand down” and await “further instructions.” Decaire Second Supp. Decl. ¶ 3 & Exh. 1.
 19 The email also said that, despite counsel's written retention agreement with AAHI's counsel,
 20 counsel was “not authorized to receive any AAHI funds in connection with the litigation now or
 21 ever.” *Id.* Counsel responded, with a copy to AAHI's General Counsel and Chief Strategy Officer,
 22 that they would continue to represent AAHI pursuant to the terms of its engagement while awaiting
 23 the Court's ruling on the pending motion.
 24
 25

26 **c. The HR Consultant's Appearance at AAHI's Offices**

27 This morning, Jamie Viramontes, the HR consultant retained by Dr. Soon-Shiong's so-

called “Independent Litigation Committee,” arrived at AAHI’s offices. Upon his arrival, Dr. Concepcion emailed Ms. Decaire and informed her that Mr. Viramontes was “part of the Litigation Team created by the Board” and would be meeting with her. Decaire Second Supp. Decl. ¶ 3. Mr. Viramontes had apparently intended to conduct a “town hall” for AAHI employees, but Ms. Decaire truthfully related that AAHI’s facilities are restricted-access and met with him in a public conference room outside of AAHI’s offices. ¶ 4. Mr. Viramontes delivered the terms of Ms. Decaire’s purported termination. *Id.* ¶ 7 & Exh. 2. Based on her understanding that the purported board actions addressed at Dr. Soon-Shiong’s August 25 meeting were invalid, Ms. Decaire has continued with her work in accordance with her duties as an AAHI officer approved by its properly constituted board. *Id.* ¶ 8.

II. Dr. Soon-Shiong’s Ongoing Actions Confirm the Need for Emergency Relief.

If allowed to proceed, the purported actions that Dr. Soon-Shiong has sought to implement over the past several days would destroy AAHI’s ability to pursue its research and development mission. Dr. Soon-Shiong is conducting a hostile takeover whereby he seeks to convert a Seattle-based non-profit into a vehicle for funneling his Foundation’s money to his preferred organizations in South Africa. Funneling these funds to public benefit organizations in South Africa not only violates AAHI’s charitable mission as outlined in its Articles and bylaws¹, but could even threaten AAHI’s tax exempt status as a Medical Research Organization². Such transfers seem to be

¹ AAHI’s bylaws do not allow any change in AAHI’s charitable mission absent the unanimous approval of the board, and no such vote, much less approval, was ever secured.

² Internal Revenue Code (“IRC”) Section 170(b)(1)(A)(iii) defines a Medical Research Organization (“MRO”) as a type of public charity “whose principal purpose or function is the providing of medical research and which is directly engaged in the continuous active conduct of medical research in conjunction with a hospital.” See also Treas. Reg. Section 1.170A-9(d)(2). MROs are treated as public charity under IRC 509(a)(1) so long as they qualify under IRC Section 170(b)(1)(A)(iii). Importantly, the applicable Treasury Regulation specifically provides that “[e]ngaging directly in the continuous active conduct of medical research does not include the disbursing of funds to other organizations for the conduct of research by them or the

1 designed to relieve (or have the effect of relieving) Dr. Soon-Shiong's family foundation of the
 2 obligation (and expense) to exercise expenditure responsibility³ required by applicable tax law,
 3 and the associated tax penalties for failing to do so.

4 The process by which these purported actions were pushed through makes a mockery of
 5 nonprofit governance and the fiduciary duties applicable to nonprofit directors. Hostile takeovers
 6 have their place in the context of for-profit corporations, where such actions may further the
 7 interests of shareholders who typically have legitimate ownership interests in the target company
 8 and a right to act in furtherance of their interests. But the only legitimate interest of the directors
 9 in a non-profit is to serve the best interests and charitable mission of the entity.
 10

11 All of the purported actions taken at yesterday's meeting and since the prior meeting
 12 orchestrated by Dr. Soon-Shiong and his advisors on August 13, 2024, are a sham and only confirm
 13 that the relief sought by the TRO motion should be granted. As set forth in AAHI's prior
 14 submission and the supporting declarations, Dr. Cherrington and Dr. Kwong were properly
 15 appointed to the board and thus have a right to participate in any board meeting. With their
 16 participation, a majority of AAHI's unconflicted directors—Dr. Casper, Dr. Mocarski, Dr.
 17 Cherrington, and Dr. Kwong—supports the relief sought by the TRO Motion and opposes Dr.
 18 Soon-Shiong's actions⁴. Without the appointment of Dr. Cherrington and Dr. Kwong, AAHI would
 19
 20

21 _____
 22 extending of grants or scholarships to others.” Treas. Reg. § 1.170A-9(d)(2)(v)(C). AAHI's
 status as an MRO was confirmed in a letter to the IRS in 2006.

23 ³ Private foundations, such as Dr. Soon-Shiong's family foundation, are required to exercise
 24 expenditure responsibility before, during and after they transfer funds outside the United States.
 Internal Revenue Code Section 4945(h), Treas. Reg. 53.4945-4 and - 5(b). Relieving the
 25 foundation of its obligation to do so by washing funds through AAHI could itself violate federal
 tax rules against private benefits to insiders.

26 ⁴ As set forth in Ms. Decaire's first supplemental declaration, at least two current directors
 aligned with Dr. Soon-Shiong, Dr. Gray and Dr. Concepcion, have conflicts arising from their
 contractual relationships with Dr. Soon-Shiong's entities, including in the case of Dr. Gray, her
 27 dependence on Dr. Soon-Shiong for funding her affiliated organizations in South Africa. Dkt 29
 ¶ 19 & Exh. 10.

1 not have the five independent directors required by its by-laws. Thus, on the contorted theory
 2 underlying Dr. Soon-Shiong's defense, AAHI would not have a properly constituted board—let
 3 alone a board that could authorize fundamental changes to AAHI's operations that would
 4 undermine its ability to fulfill its research and development mission while Dr. Soon-Shiong
 5 continues to participate in its decision making despite his conflicts of interest.

6 **III. Conclusion**

7
 8 For the foregoing reasons, as well as those set forth in its prior submissions, AAHI
 9 respectfully submits that Dr. Soon-Shiong's declaration provides further grounds for granting the
 10 TRO Motion in its entirety.

11 Dated August 26, 2024.

Respectfully submitted,

13 By: /s/ Stephen E. Morrissey

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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused the foregoing document to be served, via electronic mail, per agreement, on the following:

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*Counsel for Dr. Concepcion and Mr. Hsu, Purportedly in Their Capacity as
Litigation Committee for the Board of Directors of Access to Advanced Health Institute*

DATED this 26th day of August, 2024.

/s/ Stephen E. Morrissey
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